THE ORIGIN OF USES AND TRUSTS.

I.

USES.

IN his well-known essay, "Early English Equity,"[1] Mr. Holmes agrees with Mr. Adams,[2] that the most important contribution of the chancery has been its procedure. But he controverts "the error that its substantive law is merely the product of that procedure," and maintains that "the chancery, in its first establishment at least, did not appear as embodying the superior ethical standards of a comparatively modern state of society correcting the defects of a more archaic system." In support of these views he brings forward as his chief evidence feoffments to uses. He gives a novel and interesting account of the origin of uses, which seems to him to make it plain that "the doctrine of uses is as little the creation of the subpœna, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with."

The acceptance of these conclusions would be difficult for any one who has studied his equity under the guidance of Professor Langdell. Moreover, time has strengthened the conviction of the present writer that the principle "Equity acts upon the person" is, and always has been, the key to the mastery of equity. The difference between the judgment at law and the decree in equity goes to the root of the matter. The law regards chiefly the right of the plaintiff, and gives judgment that he recover the land, debt, or damages because they are his.[3] Equity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is

---

[1] 1 L. Quar. Rev. 162.

[2] Adams, Equity, Introd. xxxv.

[3] In the action of account, although the final judgment is that the plaintiff recover the amount found due by the auditors, the interlocutory judgment, it is true, is personal, that the defendant account (*quod computet*). It is significant that this solitary exception in the common law is a judgment against a fiduciary, a trustee of money who by the award of the auditors is transformed into a debtor.

so much more ethical than law. The difference between the two in this respect appears even in cases of concurrent jurisdiction. The moral standard of the man who commits no breach of contract or tort, or, having committed the one or the other, does his best to restore the *status quo*, is obviously higher than that of the man who breaks his contract or commits a tort and then refuses to do more than make pecuniary compensation for his wrong. It is this higher standard that equity enforces, when the legal remedy of pecuniary compensation would be inadequate, by commanding the defendant to refrain from the commission of a tort or breach of contract, or by compelling him, after the commission of the one or the other, by means of a mandatory injunction, or a decree for specific performance, so called, to make specific reparation for his wrong.

The ethical character of equitable relief is, of course, most pronounced in cases in which equity gives not merely a better remedy than the law gives, but the only remedy. Instances of the exclusive jurisdiction of equity are found among the earliest bills in chancery. For example, bills for the recovery of property got from the plaintiff by the fraud of the defendant; [1] bills for the return of the consideration for a promise which the defendant refuses to perform; [2] bills for reimbursement for expenses incurred by the plaintiff in reliance upon the defendant's promise, afterwards broken; [3] bills by the bailor for the recovery of a chattel from a defendant in possession of it after the death of the bailee.[4]

In most of these cases, it will be seen, the plaintiff is seeking restitution from the defendant, who is trying to enrich himself unconscionably at the expense of the plaintiff. Certainly in these instances of early English equity, chancery was giving effect to an enlightened sense of justice, and in so doing, was supplying the

---

[1] Bief *v.* Dier, 1 Cal. Ch. XI (1377–1399); Brampton *v.* Seymour, 10 Seld. Soc., Sel. Cas. Ch. No. 2 (1386); Grymmesby *v.* Cobham, *ibid.*, No. 61 (Henry IV?); Flete *v.* Lynster, *ibid.*, No. 119 (1417–1424); Stonehouse *v.* Stanshawe, 1 Cal. Ch. XXIX, (1432–1443).

[2] Bernard *v.* Tamworth, 10 Seld. Soc., Sel. Cas. Ch. No. 56 (Henry IV?); Appilgarth *v.* Sergeantson, 1 Cal. Ch. XLI (1438); Gardyner *v.* Kecke, 4 The Antiquary 185, s. c. 3 Green Bag 3 (1452–1454).

[3] Wheler *v.* Huchynden, 2 Cal. Ch. II (1377–1399); Wace *v.* Brasse, 10 Seld. Soc., Sel. Cas. Ch. No. 40 (1398); Leinster *v.* Narborough, 5 The Antiquary 38, s. c. 3 Green Bag 3 (cited 1480); James *v.* Morgan, 5 The Antiquary 38, s. c. 3 Green Bag 3 (1504–1515).

[4] Farendon *v.* Kelseye, 10 Seld. Soc., Sel. Cas. Ch. No. 109 (1407–1409); Harleston *v.* Caltoft, 10 Seld. Soc., Sel. Cas. Ch. No. 116 (1413–1417).

defects of the more archaic system of the common law. Nor, although the decrees in these cases are not recorded, can there be any doubt that the equitable relief was given in early times, as in later times, by commanding the obedience of the defendant.[1]

Is it possible that what is true of the early equity cases just considered is not also true of the equitable jurisdiction of uses? Let us examine the arguments to the contrary brought forward in the essay upon Early English Equity. Those arguments may be summarized as follows. The feoffee to uses corresponds, point by point, to the Salman or Treuhand of the early German law. The natural inference that the English feoffee to uses is the German fiduciary transplanted is confirmed by the facts that the continental executor was the Salman or Treuhand modified by the influence of the Roman law, and that there is no doubt of the identity of the continental executor and the English executor of Glanville's time. Although the *cestui que use* did not have the benefit of the common law possessory actions, he could, if the feoffor, take a covenant from the feoffee, and might, if not the feoffor, have the assistance of the ecclesiastical court. So that for a considerable time both feoffors and other *cestuis que use* were well enough protected. But the ecclesiastical court was not able to deal with uses in the fulness of their later development, and the chancellors carried out as secular judges the principles which their predecessors had striven to enforce in the spiritual courts.

It may be conceded that the feoffee to uses, down to the beginning of the fifteenth century, was the German Salman or Treuhand under another name. It is common learning, too, that bequests of personalty were enforced for centuries by suits against the executors in the ecclesiastical courts. It is possible, although no instance has been found, that devisees of land, devisable by custom in cities and boroughs, at one time proceeded against the executor in the spiritual court.[2] If this practice ever obtained, it disappeared with

---

[1] In Brampton *v.* Seymour (1386), *supra*, p. 262, n. 1, in the writ, *Quibusdam certis de causis*, the defendant is ordered "to appear and answer and further to do whatever shall be ordained by us." In Farendon *v.* Kelseye (1407–1409), *ibid.*, n. 4, the decree was that the defendant "should deliver them [title deeds] to him." In Appilgarth *v.* Sergeantson (1438), *ibid.*, n. 2, the prayer of the bill is "to make him do as good faith and conscience will in this part." See similar prayers in Bernard *v.* Tamworth (1399–1413), *ibid.*, n. 2; Stonehouse *v.* Stanshawe (1432–1443), *ibid.*, n. 1.

[2] In 1 Nich. Britt. 70 n. (*f*) the annotator, a contemporary of Britton, says that the king has of necessity jurisdiction of customary devises of land as of a thing annexed to freehold. "For though the spiritual judge had cognizance of such tenements so

the reign of Edward I, the devisee recovering the land devised by a real action in the common law court of the city or borough. That the ecclesiastical court ever gave relief against the feoffee to uses is to the last degree improbable. The suggestion to the contrary [1] is wholly without support in the authorities.[2] Nor has any case been found in which the feoffor obtained relief against the feoffee to uses on the latter's covenant to perform the use. Such a covenant, it is true, is mentioned in one or two charters of feoffment, but such instances are so rare that the remedy by covenant may fairly be said to have counted for nothing in the development of the doctrine of uses. If, indeed, a feoffment to uses was subject to a condition that the land should revest in the feoffor if the feoffee failed to perform the trust, the feoffor or his heir, upon the breach of this condition subsequent, might enter, or bring an action at common law for the recovery of the land. Only the feoffor or his heir could take advantage of the breach of the condition,[3] and the enforcement of the condition was not the enforcement of the use, but of a forfeiture for its non-performance. Moreover, such conditions seem not to have been common in feoffments to uses, the feoffors trusting rather to the fidelity of the feoffees. We find in the books many references to uses of lands, from the latter part of the twelfth to the beginning of the fifteenth century, but no intimation of any right of the intended beneficiary to proceed in court against the feoffee.[4] But the evidence against such a right is not merely negative. In 1402 a petition to Parliament by the Commons prays for relief against disloyal feoffees to uses because "in such cases there is no remedy unless one be provided by Parlia-

---

devised, he would have no power of execution, and testament in such cases is in lieu of charter."

[1] Early Eng. Eq., 1 L. Quar. Rev. 168.

[2] In an undated but early petition, Horsmonger *v.* Pympe, 10 Seld. Soc., Sel. Cas. Ch. No. 123, the *cestui que use* under a feoffment prays that the feoffee to uses be summoned to answer in the King's Chancery, "which is the court of conscience," since he "cannot have remedy by the law of the Holy Church nor by the common law."

[3] Y. B., 10 Hen. IV, f. 3, pl. 3.

[4] In a valuable "Note on the Phrase *ad opus* and the Early History of the Use" in 2 Pollock and Maitland, Hist. of Eng. Law, 232 *et seq.*, the reader will find the earliest allusions to uses of land in England. See also Bellewe, Collusion, 99 (1385); Y. B., 12 Ed. III (Rolls ed.), 172; Y. B., 44 Ed. III, 25 b. pl. 34; Y. B., 5 Hen. IV, f. 3, pl. 10; Y. B., 7 Hen. IV, f. 20, pl. 1; Y. B., 9 Hen. IV, f. 8, pl. 23; Y. B., 10 Hen. IV, f. 3, pl. 3; Y. B., 11 Hen. IV, f. 52, pl. 30. The earliest statutes relating to uses are 50 Ed. III, c. 6; 1 Rich. II, c. 9; 2 Rich. II, St. 2, c. 3; 15 Rich. II, c. 5; 21 Rich. II, c. 3.

ment."[1] The petition was referred to the King's Council, but what further action was taken upon it we do not know. But from about this time bills in equity became frequent.[2] It is a reasonable inference that equity gave relief to *cestuis que use* as early as the reign of Henry V (1413–1422), although there seems to be no record of any decree in favor of a *cestui que use* before 1446.[3] The first decree for a *cestui que use*, whenever it was given, was the birth of the equitable use in land. Before that first decree there was and could be no doctrine of uses. One might as well talk of the doctrine of gratuitous parol promises in our law of today. The feoffee to uses, so long as his obligation was merely honorary, may properly enough be identified with the German Salman or Treuhand. But the transformation of the honorary obligation of the feoffee into a legal obligation was a purely English development.[4]

There is no reason to doubt that this development was brought about by the same considerations which moved the chancellor to give relief in the other instances of early equity jurisdiction. The spectacle of feoffees retaining for themselves land which they had received upon the faith of their dealing with it for the benefit of others was too repugnant to the sense of justice of the community to be endured. The common law could give no remedy, for by its principles the feoffee was the absolute owner of the land. A statute might have vested, as the Statute of Uses a century later

---

[1] 3 Rot. Parl. 511, No. 112.

[2] The earliest bills of which we have knowledge are the following, arranged in chronological order to the end of the reign of Henry VI: Godwyne *v.* Profyt, 10 Seld. Soc., Sel. Cas. Ch. No. 45 (after 1393); Holt *v.* Debenham, *ibid.*, No. 71 (1396–1403); Chelmewyke *v.* Hay, *ibid.*, No. 72 (1396–1403); Byngeley *v.* Grymesby, *ibid.*, No 99 (1399–1413); Whyte *v.* Whyte, *ibid.*, No. 100 (1399–1413); Dodd *v.* Browing, 1 Cal. Ch. XIII (1413–1422); Rothenhale *v.* Wynchingham, 2 Cal. Ch. III (1422); Messynden *v.* Pierson, 10 Seld. Soc., Sel. Cas. Ch. No. 117 (1417–1424); Williamson *v.* Cook, *ibid.*, No. 118 (1417–1424); Huberd *v.* Brasyer, 1 Cal. Ch. XXI (1429); Arundell *v.* Berkeley, 1 Cal. Ch. XXXV (1435); Rous *v.* FitzGeffrey, 10 Seld. Soc., Sel. Cas. Ch. No. 138 (1441); Myrfyne *v.* Fallan, 2 Cal. Ch. XXI (1446); Felubrigge *v.* Damme and Sealis *v.* Felbrigge, 2 Cal. Ch. XXIII and XXVI (1449); Saundre *v.* Gaynesford, 2 Cal. Ch. XXVIII (1451); Anon., Fitzh. Abr. Subp., pl. 19 (1453); Edlyngton *v.* Everard, 2 Cal. Ch. XXXI (1454); Breggeland *v.* Calche, 2 Cal. Ch. XXXVI (1455); Goold *v.* Petit, 2 Cal. Ch. XXXVIII (1457); Anon., Y. B., 37 Hen. VI, f. 35, pl. 23; Walwine *v.* Brown, Y. B., 39 Hen. VI, f. 26, pl. 36; Furby *v.* Martyn, 2 Cal. Ch. XL (1460).

[3] Myrfyne *v.* Fallan, 2 Cal. Ch. XXI.

[4] The beneficiary had no action to compel the performance of the duty of the continental Salman. Schulze, Die Langobardische Treuhand, 145; 1 L. Quar. Rev. 168. Caillemer, L'Exécution Testamentaire, c. IX, expresses a different opinion. But it is certain that nothing corresponding to the English use was developed on the Continent.

did vest, the legal title in the *cestui que use*. But in the absence of a statute the only remedy for the injustice of disloyal feoffees to uses was to compel them to convey the title to the *cestui que use* or hold it for his benefit. Accordingly the right of the *cestui que trust* was worked out by enforcing the doctrine of personal obedience.[1] It is significant that in the oldest and second oldest abridgments there is no title of "Uses" or "Feffements al uses." In Statham one case of a use is under the title "Conscience" and the others under "Subpena." In Fitzherbert all the cases are under the title "Subpena."[2]

It must have been all the easier for the chancellor to allow the subpœna against the feoffee to uses because the common law gave a remedy against a fiduciary who had received chattels or money to be delivered to a third person, or, as it was often expressed, to the use[3] of a third person, or to be redelivered to the person from whom he had received the chattels or the money. In the case of chattels the bailor could, of course, maintain detinue against a bailee who broke his agreement to redeliver. But the same action was allowed in favor of a third person when the bailment was for his benefit.[4] So in the case of money the fiduciary was not only liable in account to him who entrusted him with the money, but also to the third person if he received it for the benefit of that person.[5]

---

[1] The earliest decree that we have directed the defendant to make a conveyance. Myrfyne *v.* Fallan, *supra*, p. 265, n. 2 (1446). See the prayers in the following cases: Holt *v.* Debenham, *ibid.* (1396–1403), "to do what right and good faith demand"; Byngeley *v.* Grymesby, *ibid.* (1399–1413), "answer and do what shall be awarded by the Council"; White *v.* White, *ibid.* (1399–1413), "to restore profits of the land"; Williamson *v.* Cook, *ibid.* (1417–1424), "to oblige and compel defendant to enfeoff plaintiff"; Arundell v. Berkeley, *ibid.* (1435), "to compel them to make a sufficient and sure estate of said manors to said besecher."

[2] By the middle of the fifteenth century subpœna was used in the sense of a bill or suit in equity. Fitzh. Abr. Subp. 19 (1453), "I shall have a subpena against my feoffee"; Y. B., 37 Hen. VI, f. 35, pl. 23 (1459), "An action of subpena," &c.; Y. B., 39 Hen. VI, f. 26, pl. 36 (1461), "A subpena was brought in chancery."

[3] Bailment of chattels to the use of a third person. Y. B., 18 Hen. VI, f. 9, pl. 7. Delivery of money to the use of a third person. Y. B., 33 & 35 Ed. I, 239; Y. B., 36 Hen. VI, f. 9, 10, pl. 5; Clark's Case, Godb. 210; Harris *v.* De Bervoir, Cro. Jac. 687. The count for money had and received by B to the use of A is a familiar illustration of this usage.

[4] Y. B., 34 Ed. I, 239 (*semble*); Y. B., 39 Ed. III, f. 17 *a*; Y. B., 3 Hen. VI, f. 43, pl. 20, and several other cases cited in Ames, Cas. on Trusts, 2 ed., 52, n. 1.

[5] Fitzh. Abr. Acct. 108 (1359); Y. B., 41 Ed. III, f. 10, pl. 5 (1367); Bellewe, Acct. 7 (1379); Y. B., 1 Hen. V, f. 11, pl. 21; Y. B., 36 Hen. VI, f. 9, 10, pl. 5; Y. B.,

As the chancellor, in giving effect to uses declared upon a feoffment, followed the analogy of the common law bailment of chattels, or the delivery of money upon the common law trust, so, in enforcing the use growing out of a bargain and sale, he followed another analogy of the common law, that of the sale of a chattel. The purchaser of a chattel, who had paid or become indebted for the purchase money, had an action of detinue against the seller. Similarly the buyer of land who had paid or become a debtor for the price of the land, was given the right of a *cestui que use*. But the use by bargain and sale was not enforced for about a century after the establishment of the use upon a feoffment. In 1506 Rede, J., said: "For the sake of argument I will agree that if one who is seised to his own use sells the land, he shall be said to be a feoffee to the use of the buyer." [1] But Tremaile, J., in the same case dissented vigorously, saying: "I will not agree to what has been said, that, if I sell my land, I straightway upon the bargain and money taken shall be said to be a feoffee to the use of the buyer; for I have never seen that an estate of inheritance may pass from the one seised of it except by due formality of law as by livery or fine or recovery; by a bare bargain I have never seen an inheritance pass." Just how early in the reign of Henry VIII the opinion of Rede, J., prevailed is not clear, but certainly before the Statute of Uses.[2] Equity could not continue to refuse relief to the buyer of land against a seller who, having the purchase money in his pocket, refused to convey, when under similar circumstances the buyer of a chattel was allowed to sue at law. The principle upon which equity proceeded is well expressed in "A Little Treatise concerning Writs of Subpœna," [3] written shortly after 1523: "There is a maxim in the law that a rent, a common, annuity and such other things as lie not in manual occupation, may not have commencement, nor be granted to none other without writing. And thereupon it followeth, that if a man for a certain sum of money sell another forty pounds of rent yearly, to be percepted of his lands in D, &c., and the buyer, thinking that

---

18 Ed. IV, f. 23, pl. 5, and several other cases cited in Ames, Cas. on Trusts, 2 ed., 4, n. 1, n. 2.

[1] Anon., Y. B., 21 Hen. VII, f. 18, pl. 30.

[2] Bro. Ab. Feff. al Uses, pl. 54 (1533); Anon., Y. B., 27 Hen. VIII, f. 5, pl. 15 (1536), *per* Shelley, J.; Anon., Y. B., 27 Hen. VIII, f. 8, pl. 22 (1536). See also Bro. Ab. Conscience, pl. 25 (1541); Bro. Ab. Feff. al Uses, pl. 16 (1543).

[3] Doct. & St., 18 ed., Appendix, 17; Harg. L. Tr. 334.

the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at the common law for lack of a deed; and thereupon inasmuch as he that sold the rent hath *quid pro quo*, the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion without any recompense, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna."

The reader will have noted the distinction taken in this quotation between the oral grant for value and the parol gratuitous grant. In the latter case there was neither glaring injustice nor a common law analogy in the treatment of a similar grant of chattels or money to warrant the intervention of equity. Further evidence that equity never enforced gratuitous parol undertakings is to be found in this remark of counsel in 1533: "By Hales, a man cannot change [i. e. create] a use by a covenant[1] which is executed before, as to Covenant to bee seised to the use of W. S. because that W. S. is his cousin; or because that W. S. before gave to him twenty pound, except the twenty pound was given to have the same land. But otherwise of a consideration present or future, for the same purpose, as for one hundred pound paid for the land *tempore conventionis*, or to be paid at a future day, or for to marry his daughter, or the like."[2] It is evident from these authorities that equity in refusing relief upon gratuitous parol undertakings, or upon promises given only upon a past consideration, was simply following the common law, which regarded all such undertakings or promises as of no legal significance whether relating to land, chattels, or money.

But grants of chattels and money, although gratuitous, were operative at common law, if in the form of instruments under seal. The donee in a deed of gift of chattels could maintain detinue against the donor who withheld possession of them. The grant or promise by deed of a definite amount of money created a legal debt, enforceable originally by an action of debt, and in later times by an action of covenant also.[3] If, as we have seen, equity en-

[1] The word covenant was used at this time not in the restricted sense of undertaking under seal, but meant agreement in the widest sense. See 2 HARV. L. REV. 11, n. 1, and also Wheler *v.* Huchynden, 2 Cal. Ch. 11; Wace *v.* Brasse, 10 Seld. Soc., Sel. Cas. Ch. No. 40; Sharrington *v.* Strotton, Plowd. 298, *passim*; S. C. Ames, Cas. on Trusts, 2 ed., 109.

[2] Bro. Ab. Feff. al Uses, 54, March's translation, 95.

[3] 2 HARV. L. REV. 56.

forced the use upon a feoffment or sale of land after the analogy of the bailment of a chattel (or trust of money), and the sale of a chattel, why, it may be asked, did not the chancellor create a use in favor of the donee of land by deed of gift after the analogy of the deed of gift of chattels or money? Chancery, it is conceived, might, without any departure from principle, have taken this step and treated every donee of land by deed of grant as a *cestui que use*. But to one who keeps in mind the jealousy with which the common law judges regarded the growing jurisdiction of the chancellor, it is not surprising that for the most part equity declined to enforce gratuitous instruments under seal. There was, however, one class of gratuitous grants of land by deed in which equity created a use in favor of the donee; namely, grants or covenants to stand seised to the use of a blood relation, or of one connected by marriage.[1] These uses are commonly said to arise in consideration of blood or marriage. But consideration in such cases is not used in its normal sense of the equivalent for a promise, but in the general sense of reason or inducement for the agreement to stand seised. The exception in favor of those related by blood or marriage had in truth nothing to do with the doctrine of consideration and was established in the interest of the great English families. The aristocratic nature of this doctrine is disclosed in the following extract from Bacon's Reading on the Statute of Uses:[2] "I would have one case showed by men learned in the law where there is a deed and yet there needs a consideration . . . and therefore in 8 Reginae [Sharrington *v.* Strotton, Plowd. 298] it is solemnly argued that a deed should raise an use without any other consideration . . . And yet they say that an use is a nimble and light thing; and now contrariwise, it seemeth to be weightier than anything else; for you cannot weigh it up to raise it, neither by deed nor deed enrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law, but it is a reason of Chancery and it is this: that no court of conscience will enforce *donum gratuitum*, tho' the interest appear never so clearly where it is not executed or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chancery."

---

[1] Sharrington *v.* Strotton, Plowd. 298 (1565), was the first case of the kind.

[2] Rowe's ed., 13, 14; 7 Spedding's Bacon, 1879 ed., 403, 404.

II.

TRUSTS.[1]

"The strange doctrine of Tyrrel's Case."[2] "The object of the legislature appears to have been the annihilation of the common law use. The courts, by a strained construction of the statute, preserved its virtual existence."[3] "Perhaps, however, there is not another instance in the books in which the intention of an act of Parliament has been so little attended to."[4] "This doctrine must have surprised every one who was not sufficiently learned to have lost his common sense."[5] Such are a few of the many criticisms passed upon the common law judges who decided, in 1557, that a use upon a use was void, and therefore not executed by the Statute of Uses. It has, indeed, come to be common learning that this decision in Tyrrel's Case was due to "the absurd narrowness of the courts of law"; that the liberality of the chancellor at once corrected the error of the judges by supporting the second use as a trust; and "by this means a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add at most three words to a conveyance."[6]

This common opinion finds, nevertheless, no support in the old books. On the contrary, they show that the doctrine of Tyrrel's Case was older than the Statute of Uses, — presumably, therefore, a chancery doctrine, — and that the statute so far accomplished its purpose, that for a century there was no such thing as the separate existence in any form of the equitable use in land.

The first of these propositions is proved by a case of the year 1532, four years before the Statute of Uses, in which it was agreed by the Court of Common Bench that "where a rent is reserved, there, though a use be expressed to the use of the donor or lessor, yet this is a consideration that the donee or lessee shall have it for

---

[1] By the courtesy of the publisher the second part of this article is reprinted from 4 Green Bag 81, in which it first appeared under the title: Tyrrel's Case and Modern Trusts.

[2] Digby, Prop., 2 ed., 291.

[3] Cornish, Uses, 41, 42.

[4] Sugden, Gilbert, Uses, 347, n. 1.

[5] Williams, Real Prop., 13 ed., 162.

[6] Hopkins *v.* Hopkins, 1 Atk. 591, *per* Lord Hardwicke. See also Leake, Prop. 125; 1 Hayes, Convey., 5 ed., 52; 1 Sanders, Uses, 2 ed., 200; 1 Cruise, Dig., 4 ed., 381; 2 Bl. Comm. 335; 1 Spence, Eq. Jurisp., 490.

his own use; and the same law where a man sells his land for £20 by indenture, and executes an estate to his own use; this is a void limitation of the use; for the law, by the consideration of money, makes the land to be in the vendee."[1] Neither here nor in Benloe's report of Tyrrel's Case[2] is the reason for the invalidity of the second use fully stated. Nor does Dyer's reason, "because an use cannot be ingendered of an use,"[3] enlighten the reader. But in Anderson's report we are told that "the bargain for money implies thereby a use, and the limitation of the other use is merely contrary."[4] And in another case in the same volume the explanation is even more explicit: "The use is utterly void because by the sale for money the use appears; and to limit another (although the second use appear by deed) is merely repugnant to the first use, and they cannot stand together."[5] The second use being then a nullity, both before and after the Statute of Uses, that statute could not execute it, and the common law judges are not justly open to criticism for so deciding.

Nor is there any evidence that the second use received any recognition in chancery before the time of Charles I. Neither Bacon nor Coke intimates in his writings that a use upon a use might be upheld as a trust. Nor is there any such suggestion in the cases which assert the doctrine of Tyrrel's Case.[6] There is, on the other hand, positive evidence to the contrary. Thus, in Cromp-

---

[1] Bro. Ab. Feff. al Uses, 40; *ibid.*, 54; Gilb. Uses, 161 *accord.*

[2] Benl., 1669 ed., 61.

[3] Dyer 155, pl. 20.

[4] 1 And. 37, pl. 96.

[5] 1 And. 313. See also 2 And. 136, and Daw *v.* Newborough, Comyns, 242: "For the use is only a liberty to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use."

This notion of repugnancy explains also why, in the case of a conveyance to A, to the use of A, to the use of B, the statute does not operate at all. The statute applies only to the chancery use, which necessarily implies a relation between two persons. But A's use in the case put is obviously not such a use, and therefore not executed. The words "to the use of A" mean no more than for the benefit of A. But it is none the less a contradiction in terms to say in the same breath that the conveyance is for the benefit of A and for the use of B. B's repugnant use is therefore not executed by the statute. Anon., Moore 45, pl. 138; Whetstone *v.* Bury, 2 P. Wms. 146; Atty.-Gen. *v.* Scott, Talb. 138; Doe *v.* Passingham, 6 B. & C. 305. The opinion of Sugden to the contrary in his Treatise on Powers, 7 ed., 163–165, is vigorously and justly criticized by Prof. James Parsons in his "Essays on Legal Topics," 98.

[6] Bro. Ab. Feff. al Uses, pl. 54: Anon., Moore 45, pl. 138; Dillon *v.* Freine, Poph. 81; Stoneley *v.* Bracebridge, 1 Leon. 6; Read *v.* Nash, 1 Leon. 148; Girland *v.* Sharp, Cro. Eliz. 382; Hore *v.* Dix, 1 Sid. 26; Tippin *v.* Cosin, Carth. 273.

ton, Courts:[1] "A man for £40 bargains land to a stranger, and the intent was that it should be to the use of the bargainor, and he in this court [chancery] exhibits his bill here, and he cannot be aided here against the feoffment [bargain and sale?] which has a consideration in itself, as Harper, Justice, vouched the case." Harper was judge from 1567 to 1577.

As the modern passive trust, growing out of the use upon a use, is in substance the same thing as the ancient use, it would seem to be forfeitable under the Stat. 33 Henry VIII, c. 20, § 2, by which "uses" are forfeited for treason. Lord Hale was of this opinion, which is followed by Mr. Lewin and other writers. But it was agreed by the judges about the year 1595 that no use could be forfeited at that day except the use of a chattel or lease, "for all uses of freehold are, by Stat. 27 Henry VIII, executed in possession, so no use to be forfeited."[2] There is also a *dictum* of the Court of Exchequer of the year 1618, based upon a decision five years before, that a trust of a freehold was not forfeitable under the Stat. 33 Henry VIII. Lord Hale and Mr. Lewin find great difficulty in understanding these opinions.[3] If, however, the modern passive trust was not known at the time of these opinions, the difficulty disappears; for the freehold trust referred to must then have been a special or active trust, which was always distinct from a use,[4] and therefore neither executed as such by the Statute of Uses nor forfeitable by Stat. 33 Henry VIII.

In Finch's Case,[5] in chancery, it was resolved, in 1600, by the two Chief Justices, Chief Baron, and divers other justices, that "if a man make a conveyance, and expresse an use, the party himself or his heirs shall not be received to averre a secret trust, other than the expresse limitation of the use, unless such trust or confidence doe appear in writing, or otherwise declared by some apparent matter." But the trust here referred to was probably the special or active trust, and not the passive trust. The probability becomes nearly a certainty in the light of the remark of Walter, *arguendo*,

---

[1] F. 54, a; s. c. Cary 19, where the reporter adds: "And such a consideration in an indenture of bargain and sale seemeth not to be examinable, except fraud be objected, because it is an estoppel."

[2] 1 And. 294.

[3] Lewin, Trusts, 8 ed., 819.

[4] Bacon, Stat. of Uses, Rowe's ed., 8, 9, 30; 1 Sanders, Uses, 5 ed., 2, 3; 1 Coke 139 *b*, 140 *a*.

[5] Fourth Inst. 86.

twenty years later, in Reynell *v.* Peacock.[1] "A bargain and sale and demise may be upon a secret trust, but not upon a use." And the case of Holloway *v.* Pollard[2] is almost a demonstration that the modern passive trust was not established in 1605. This was a case in chancery before Lord Chancellor Ellesmere, and the defendant failed because his claim was nothing but a use upon a use.

Mr. Spence and Mr. Digby cite the following remark of Coke in Foord *v.* Hoskins,[3] as showing that chancery had taken jurisdiction of the use upon a use as early as 1615: "If *cestuy que use* desires the *feoffees* to make an estate over and they so to do refuse, for this refusal an action on the case lieth not, because for this he hath his proper remedy by a subpœna in Chancery." "It seems," says Mr. Digby, "that this could only apply to a use upon a use."[4] But if the *cestuy que use* here referred to were the second *cestuy*, he would not proceed against the *feoffees*, for the Statute of Uses would have already transferred the legal estate from them to the first *cestuy*. It would seem that Coke was merely referring to the old and familiar relation of *cestuy que use* and *feoffees* to use as an analogy for the case before him, which was an action on the case by a copy-holder against the lord for not admitting him.

The earliest reported instance in which a use upon a use was supported as a trust seems to have been Sambach *v.* Dalton, in 1634, thus briefly reported in Tothill:[5] "Because one use cannot be raised out of another, yet ordered, and the defendant ordered to passe according to the intent." The conveyance in this case was probably gratuitous. For in the "Compleat Attorney," published in 1666, this distinction is taken: "If I, without any consideration, bargain and sell my land by indenture, to one and his heirs, to the use of another and his heirs (which is a use upon a use), it seems the court will order this. But if it was in consideration of money by him paid, here (it seems) the express use is void, both in law and equity."[6] On the next page of this same book the facts of Tyrrel's Case are summarized with the addition: "Nor is there, as it seems, any relief for her [the second *cestuy que use*] in this court in a way of equity, because of the considera-

[1] 2 Rolle 105. See also Crompton, Courts, 58, 59.
[2] Moore 761, pl. 1054.
[3] 2 Bulstr. 336, 337.
[4] Digby, Prop., 3 ed., 328. See 1 Spence, Eq. Jurisp., 491.
[5] Page 188; s. c. Shep. Touch. 507.
[6] Page 265. Compare also pages 507 and 510 of Shep. Touch.

tion paid; but if there was no consideration, on the contrary, Tothill, 188." As late as 1668, in Ash *v.* Gallen,[1] a chancery case, it was thought to be a debatable question whether on a bargain and sale for money to A to the use of B, a trust would arise for B. Even in the eighteenth century, nearly two hundred years, that is, after the Statute of Uses, Chief Baron Gilbert states the general rule that a bargain and sale to A to the use of B gives B a chancery trust with this qualification: "*Quære tamen*, if the consideration moves from A."[2]

In the light of the preceding authorities, Lord Hardwicke's oft quoted remark that the Statute of Uses had no other effect than to add three words to a conveyance must be admitted to be misleading. Lord Hardwicke himself, some thirty years afterwards, in Buckinghamshire *v.* Drury,[3] put the matter much more justly: "As property stood at the time of the statute, personal estate was of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after (I wonder how they ever happened to do so)." The modern passive trust seems to have arisen for substantially the same reasons which gave rise to the ancient use. The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the chancellor at length compelled the faithless legal owner to perform his agreement.

James Barr Ames.

---

[1] 1 Ch. Cas. 114.

[2] Gilbert, Uses, 162. But in 1700 the limitation of a use upon a use seems to have been one of the regular modes of creating a trust. Symson *v.* Turner, 1 Eq. Cas. Abr. 383. The novelty of the doctrine is indicated, however, by the fact that, even in 1715, in Daw *v.* Newborough, Comyns 242, the court, after saying that the case was one of a use upon a use, which was not allowed by the rules of law, thought it worth while to add: "But it is now allowed by way of trust in a court of equity."

[3] 2 Eden 65.